NO. 08-18-00180-CR

IN THE EIGHTH COURT OF APPEALS
EL PASO, TEXAS

MARIO ERNESTO MARTELL,
Appellant,

V.

THE STATE OF TEXAS
Appellee.

On Appeal from Cause No. 990D03958
In the Criminal District Court Number One of El Paso County, Texas

APPELLANT'S BRIEF

Oral Argument is requested

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ORAL ARGUMENT REQUESTED

Appellant submits oral argument would aid this Court in its decisions with the issue presented of whether a defendant probationer residing in a foreign country with permission is entitled to assert the affirmative defense of due diligence.

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STATEMENT OF THE CASE

On September 21, 1999, the Grand Jury of the County of El Paso, Texas, indicted MARIO ERNESTO MARTELL (hereinafter "Martell") with Unlawful Possession of Marihuana. (CR: 7).[1] On October 6, 1999, Martell pled guilty to Possession of Marijuana > 5LBS < 50LBS and was sentenced to four (4) years community supervision under deferred adjudication. (CR: 19-21). Roughly two and a half years later, on March 4, 2002, the State of Texas filed its Motion to Adjudicate Guilt based solely on the ground that Martell failed to report to a supervision officer as directed. (CR: 28-38). The trial court heard Martell's contested revocation on January 26, 2018. (CR: 63); (RR3). After taking the matter under advisement, the trial court determined on May 31, 2018, that the allegations in the State's motion to adjudicate guilt were true and that Martell was not entitled to the due diligence defense and revoked Martell's probation. (RR4: 5). Martell timely filed his Notice of Appeal on October 10, 2018. (CR: 79).

[1] In this Brief, "CR" refers to the Clerk's Record, which is followed by page number. "RR" refers to the Reporter's Record, and is followed by the volume number, then page number. "SX" refers to the State's exhibits, also numbered. "DX" refers to Defense exhibits.

ISSUES PRESENTED

1) THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT MARTELL WAS NOT ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE OF DUE DILIGENCE BECAUSE HE RESIDED IN MEXICO

2) EVEN IF THE COURT DID CONSIDER DEFENDANT MARTELL'S DUE DILIGENCE DEFENSE, THE TRIAL COURT ERRED BECAUSE DEFENDANT MARTELL PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE STATE FAILED TO EXHIBIT DUE DILIGENCE

STATEMENT OF FACTS

On October 6, 1999, Martell pled guilty to Possession of Marijuana > 5LBS < 50LBS. (CR: 19-21). Judge Jack N. Ferguson sentenced him to four (4) years community supervision under deferred adjudication. (CR: 19-21). The terms and conditions of his community supervision specified that Martell be allowed to live in Ciudad Juarez, Mexico. (CR: 22). Accordingly, Martell provided the Department with an address of Juan Escutia No. 1257, Ciudad Juarez, Chihuahua, Mexico. (CR: 24). Nowhere in his contract did Martell waive diligence based on his residency in Ciudad Juarez, Mexico. (CR: 22-24). Judge Ferguson signed Martell's terms and conditions of community supervision on October 6, 1999. (CR: 23).

Eight months later, the Department submitted a violation notice to the District Attorney. (RR3: 13). On October 9 of 2000, the 34th Impact Judicial District Court issued a bench warrant based on the violation notice. (CR: 26-27). The State of Texas filed its Motion to Adjudicate Guilt on March 4 of 2002. (CR: 28-38). Accordingly, the 34th Impact Judicial District Court issued a *capias* on March 4, 2002. (CR: 35). In its Motion, the State alleged only that Martell failed to report to Carlos Estrello, Martell's supervision officer, from December of 1999 through December of 2001; and that he failed to pay his supervision fees from December of 1999 through December of 2001. (CR: 28-35). The State did not file any amendments to the March 4th of 2002, Motion to Adjudicate. (RR3: 19).

Fifteen years later, on August 11, 2017, the Sheriff executed the warrant, arrested Martell, and served him with a copy of the State's Motion to Adjudicate. (CR: 53-54). That same day, the Jail Magistrate Court of El Paso County, Texas, appointed the Public Defender to represent Martell in his adjudication proceedings. (CR: 45). Subsequently, the trial court heard Martell's contested adjudication on January 26, 2018. (CR: 63); (RR3). At Martell's contested adjudication, the State abandoned Martell's failure to pay fines as a basis for adjudication and proceeded only on Martell's failure to report to a supervision officer as directed. (RR3: 23).

During the hearing, Adrian Aguirre ("hereinafter Aguirre"), court liaison for the West Texas Community Supervision and Corrections Department (hereinafter "the Department"), testified from Martell's probation file. (RR3: 6). Aguirre confirmed Martell's last known home address and last known employment address, as Juan Escutia No. 1257, Ciudad Juarez, Chihuahua, Mexico. (RR3: 19, 22). This was the same address Martell provided on October 6, 1999, on his personal data sheet. (CR: 24) (RR3: 22). Aguirre indicated that the last time Martell reported to the Department was in November of 1999. (RR3: 16).

Aguirre also testified that in January of 2000, following Martell's failure to report in December of 1999, the Department sent a letter to Martell's Juan Escutia address in Ciudad Juarez, Mexico. (RR3: 8). Then, again in February of 2000, when Martell did not report in January, the Department sent a letter to Martell's Juan

Escutia address in Ciudad Juarez, Mexico. (RR3: 9). It is undisputed that in early 2000, the Department sent two international mailings to Martell. (RR3: 9). In addition, on February 15 of 2000, the department placed an international telephone call to the number Martell provided to the Department –a telephone number in Ciudad Juarez, Mexico. (RR3: 10). In that phone call to Mexico, the Department made contact with Maribel, a friend of the Martell family, however no details of the call were recorded. (RR3: 13). Specifically, no evidence was presented that the Department left a message with Maribel or requested a different telephone number for Martell. No evidence was presented that the Department sent additional mailings or made a follow-up phone call to Mexico at a later time.

The Department made no additional attempts to make contact with Martell after the January and February of 2000 international mailings and international telephone calls. (RR3: 20-21). Certainly, the Department made no attempts to make contact with Martell after the *capias* issued on March 4th, 2002. (RR3: 20). In fact, Mr. Aguirre testified that it is the policy of the Department to prohibit supervision officers from making contact with probationers once a *capias* issues. (RR3: 21).

Moreover, there was no indication in the Department's file that the sheriff's office made any attempts to make contact with Martell after March 4th of 2002, or that any other peace officer tried to establish contact with Martell after that date. (RR3: 20). Aguirre testified that to the Department's knowledge there was no

contact attempted by a Department supervision officer, a sheriff's officer, or any other peace officer with the power of arrest under a warrant. (RR3: 20).

Based on these facts, Martell argued that he was entitled to assert the due diligence defense pursuant to Texas Code of Criminal Procedure art. 42A.756. Following testimony by Aguirre and the presentation of evidence, the trial court nonetheless determined the allegations in the State's motion to adjudicate guilt were true and, in granting the State's motion, the trial court explained that:

> the fact that Mr. Martell had been given permission to reside in Mexico, [I don't feel that it is] in the interest of justice to allow him to use that also as a reason to bring up the due diligence was not done like it would have been done if he had been residing here in El Paso County.
>
> …
>
> So I [do] find that the allegations in the motion to adjudicate guilt [are] true, that [Martell] didn't report during that – this period of time in violation of his probation.

(RR4: 5).

SUMMARY OF THE ARGUMENT

1. The evidence and the record support the conclusion that the trial court erred in finding that Martell was not entitled to the affirmative defense of due diligence.

2. Martell was adjudicated solely on the ground that he violated his probation by failing to report to a supervision officer as directed.

3. Under Texas Code of Criminal Procedure art. 42A.756, a defendant is entitled to assert the affirmative defense of due diligence for an alleged failure to report to a supervision officer as directed.

4. Texas Code of Criminal Procedure art. 42A.756 does not require that individuals reside in the United States to assert the affirmative defense of due diligence.

5. No evidence was presented at the January 26, 2018, adjudication hearing that anyone ever contacted or attempted to contact Martell in person at his last known residence address or last known employment address.

6. Moreover, the evidence presented at the January 26, 2018, adjudication hearing demonstrates that all documented attempts to contact Martell were made prior to *capias* being issued for the alleged violation.

7. The evidence adduced at the adjudication hearing show that no attempt in any form was made to contact Martell at his last known residence address or last known employment address by any supervision officer, peace officer, or any other officer after the 34th Impact Judicial District Court issued a *capias* for the alleged violation on March 4 of 2002.

8. Based on the record and the evidence, this court should reverse the trial court's ruling on the State's motion to adjudicate and find that Martell was entitled to assert the affirmative defense of due diligence and that said defense was proven by a preponderance of the evidence.

ARGUMENTS

1. FIRST ISSUE: 1) THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT MARTELL WAS NOT ENTITLED TO ASSERT THE AFFIRMATIVE DEFENSE OF DUE DILIGENCE BECAUSE HE RESIDED IN MEXICO

a. Standard of Review

Generally speaking, the rulings of a trial court are presumed to be correct and the appellant must affirmatively show the existence of error. *Hardin v. State*, 471 S.W.2d 60, 63 (Tex. Crim. App. 1971). However, an abuse of discretion occurs if the trial court clearly fails to analyze or apply the law correctly. *State v. Ballard*, 987 S.W.2d 889, 891 (Tex. Crim. App. 1999). This is because a trial court has no discretion in determining what the law is or applying the law to the facts. *Id.*; *see also Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (Tex. 1996). "Misapplication of the law to the facts of a particular case is a *per se* abuse of discretion." *Id.* Consequently, the trial court's erroneous legal conclusion is an abuse of discretion. *Huie*, 922 S.W.2d at 927-28.

b. Application

The trial court erred by failing to properly consider Martell's affirmative defense of due diligence. The Texas Code of Criminal Procedure states that:

> [f]or the purposes of a hearing under Article 42A.108, it is an affirmative defense to revocation for an alleged violation based on a failure to report to a supervision officer as directed or to remain within a specified place that no supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged *violation contacted or attempted to contact the defendant in person at the defendant's last known residence address or last known employment address*, as reflected in the files of the department servicing the county in which the order or deferred adjudication community supervision was entered.

Tex. Code Crim. Pro. Art. 42A.756 (emphasis added). The Code does not mandate that individuals reside in the United States to make use of the affirmative defense nor does it preclude individuals residing in a foreign country from asserting it. Article 42A.756's only limitation is that it may only be invoked for two revocation allegations: failure to report to a supervision officer as directed or failure to remain within a specified place. *See Garcia v. State*, 387 S.W.3d 20, 23-24 (Tex, Crim. App. 2012) (citing Tex. Code Crim. Pro. Art. 42A.756).

In its Motion, the State alleged that Martell failed to report to Carlos Estrello, Martell's supervision officer, from December of 1999 through December of 2001; and that he failed to pay his supervision fees from December of 1999 through December of 2001. (CR: 28-35). At the contested adjudication hearing, the State

abandoned Martell's failure to pay fines as a basis for revocation and proceeded only on Martell's failure to report to a supervision officer as directed. (RR3: 23). Martell was therefore entitled to assert the affirmative defense.

The trial court did not produce written findings of facts and conclusions of law. In its oral pronouncement on the record, the trial court stated that it did "consider the arguments on the due diligence." (RR4:5). However, the trial court further stated that

> the fact that Mr. Martell had been given permission to reside in Mexico, [I don't feel that it is] in the interest of justice to allow him to use that also as a reason to bring up [that] the due diligence was not done like it would have been done if he had been residing here in El Paso County.

(RR4: 5). Based on its pronouncement, the trial court believed it had the discretion to decide whether Martell could even assert the affirmative defense. Just as plainly, the trial court believed that Martell was not entitled to do so because he resided, with permission, in Mexico. The trial court therefore abused its discretion by failing to apply the law to the facts. This court should reverse the trial court's judgment and remand the case to the trial court for further proceedings.

2. SECOND ISSUE: EVEN IF THE COURT DID CONSIDER DEFENDANT MARTELL'S DUE DILIGENCE DEFENSE, THE TRIAL COURT ERRED BECAUSE DEFENDANT MARTELL PROVED BY A PREPONDERENCE OF THE EVIDENCE THAT THE STATE FAILED TO EXHIBIT DUE DILLIGENCE

a. Standard of Review

A trial court's ruling on a motion to adjudicate is reviewed in the same manner as a decision to revoke community supervision—for abuse of discretion. *Little v.*

State, 376 S.W.3d 217, 219 (Tex. App.—Fort Worth 2012, pet ref'd) (citing *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006)); *Simon v. State*, 442 S.W.3d 581, 583 (Tex. App.—San Antonio 2014, no pet.). In determining an abuse of discretion, the appellate court looks to whether the trial court's decision was arbitrary, unreasonable, and without reference to guiding rules and principles. *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (quoting *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied*, 476 U.S. 1159, 106 S. Ct. 2279, 90 L. Ed. 2d 721 (1986)).

The State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993); *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex. Crim. App. 1974). If the State fails to meet its burden of proof, the trial court abuses its discretion in revoking community supervision. *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). Proof by a preponderance of evidence as to any one of the alleged violations of the conditions of community supervision is sufficient to support a trial court's decision to revoke community supervision. *See Marsh v. State*, 343 S.W.3d 475, 479 (Tex. App.—Texarkana 2011, pet. ref'd) (citing *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980)).

In a revocation hearing, the trial court is the sole trier of the facts and determines the credibility of the witnesses and the weight given to their testimony.

In re T.R.S., 115 S.W.3d 318, 321 (Tex. App.—Texarkana 2003, no pet.). A trial court's decision to revoke community supervision and to proceed to adjudication is examined in the light most favorable to the trial court's judgment. *Id.*

The state must prove its allegation that a defendant violated a condition of his community supervision by a preponderance of the evidence. *Cobb*, 851 S.W.2d at 873. However, the burden is on the defendant to establish an affirmative defense by a preponderance of the evidence. Tex. Penal Code § 2.04(d); *Zuliani v. State*, 97 S.W.3d 589, 594 n.5 (Tex. Crim. App. 2003). When conducting a legal sufficiency review concerning an issue on which the defendant had the burden of proof, the appellate court examines the evidence in a light most favorable to the verdict and reverses only when the evidence conclusively establishes the opposite. *Ballard v. State*, 161 S.W.3d 269 (Tex. App.—Texarkana 2005), *aff'd*, 193 S.W.3d 916 (Tex. Crim. App. 2006). An appellate court reviews the legal sufficiency of the evidence to support a rejection of the defendant's affirmative defense under a two-part test. *See Ballard*, 161 S.W.3d at 272. First, the appellate court examines the record for evidence that supports rejection of the defendant's affirmative defense while ignoring all evidence to the contrary. *Id.* If there is no evidence to support the fact finder's rejection of the defendant's affirmative defense, then an appellate court next examines whether the record supports the defendant's affirmative defense as a matter of law. *Id.* If the record reveals evidence of the defendant's affirmative

defense that was not subject to a credibility assessment by the fact finder, then the evidence shows as a matter of law that the defendant proved his affirmative defense. *See Cleveland v. State*, 177 S.W.3d 374, 388-89 (Tex. App.—Houston [1st Dist.] 2005, pet. ref'd). However, if the evidence supporting the defendant's affirmative defense was subject to an assessment of credibility, that evidence is not considered in the appellate court's matter-of-law assessment. *See id.* at 389.

When conducting a factual sufficiency review regarding a defendant's affirmative defense, an appellate court reviews all of the evidence in a neutral light. *See Clark v. State*, 190 S.W.3d 59, 63 (Tex. App.—Amarillo 2005, no pet.). When a defendant has asserted an affirmative defense, an appellate court considers all of the evidence and determines whether the judgment rendered is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See Edwards v. State*, 106 S.W.3d 833, 843 (Tex. App.-Dallas 2003, pet. ref'd); *Cleveland*, 177 S.W.3d at 390; *Ballard*, 161 S.W.3d at 271. When an appellate court concludes the contrary evidence is insufficient to support the fact finder's rejection of a defendant's affirmative defense, it must clearly state why the ruling is so against the great weight and preponderance of the evidence as to be manifestly unjust, why it shocks the conscience, or why it clearly demonstrates bias. *See Meraz v. State*, 785 S.W.2d 146, 154 n.2 (Tex. Crim. App. 1990); *Howard v. State*, 145 S.W.3d 327, 335 (Tex. App.—Fort Worth 2004). However, an appellate court may not usurp the function

of the factfinder by substituting its judgment in place of the factfinder's assessment of the weight and credibility of the witnesses' testimony. *Matlock v. State*, 392 S.W.3d 662, 671 (Tex. Crim. App. 2013). Thus, an appellate court may sustain a defendant's factual sufficiency claim only if the court clearly states why the ruling is so against the great weight of the evidence as to be manifestly unjust. *Id.*

b. Application

Pursuant to past common law scheme, it was a defense to revocation that, in executing the *capias* or warrant and securing a hearing on its motion, the State had failed to exercise "due diligence." *Peacock v. State*, 77 S.W.3d 285, 287-88 (Tex. Crim. App. 2002) (superseded by statute). This due diligence required that the State make "reasonable investigative efforts . . . to apprehend the person sought." *Id.* The burden was on the defendant to raise the defense, but once he did so, the burden shifted to the State to prove due diligence by a preponderance of the evidence. *Id.* at 288. In 2003, the State Legislature amended this scheme by replacing the common law due diligence scheme with statutory amendments to Texas Code of Criminal Procedure Article 42.12 (now recodified as Article 42A.756).

Under the current statute, there is no requirement for investigative efforts. *Garcia*, 387 S.W.3d at 23. The statute imposes on the State the duty to attempt to make contact, in person, at a last known address, either residential or place of employment. *See* Tex. Code Crim. Pro. Art. 42A.756. In *Harris v. State*, the Texas

Criminal Court of Appeals held that the State must show that it used diligence after a motion to revoke was filed and the *capias* issued. *Harris v. State*, 843 S.W.2d 34, 36 (Tex. Crim. App. 1992) (overruled in part by *Bawcom v. State*, 78 S.W.3d 360 (Tex. Crim. App. 2002)). Ten years later, the same court overruled *Harris* "insofar as [it] held that actions taken before a motion to revoke is filed or a *capias* is issued could not be considered as evidence of due diligence." *Bawcom*, 78 S.W.3d at 367. As explained in the concurrence by Justice Johnson,

> the law does not require a vain act. In such circumstances, pre-*capias* efforts may be a partial explanation of apparent lack of diligence post-*capias*. *Harris* did not forbid consideration of such *pre-capias* efforts, only reliance on them to justify *de minimus* efforts post-*capias*. The state must indeed show appropriate diligence after the *capias* issues. It may be appropriate to consider pre-*capias* efforts in considering whether post-*capias* efforts constitute due diligence, but pre-*capias* efforts will not excuse inaction by the state after a *capias* issues.

Bawcom, 78 S.W.3d at 367 (Johnson, J., concurring).

The *Bawcom* court then analyzed the facts in *Harris* and determined that the State did not exercise due diligence even when pre-*capias* efforts were taken into account. In *Bawcom*, the defendant was allowed to be supervised in a different county than where he was sentenced. *Id.* at 365. Letters were mailed on four separate occasion and although none were answered, none were returned as undeliverable. *Id.* While the letters were going out, the probation office placed a phone call and reached the defendant's mother, and through her they requested that the defendant

appear. *Id.* Finally, the court stressed that no "agent of law enforcement or the probation office ever went" to the defendant's residence or "made any effort to reach" him through his family.[2] *Id.*

The Texarkana court of appeals in *Wheat v. State* similarly focused on this lack of in person contact. *See Wheat v. State*, 165 S.W.3d 802 (Tex. App.—Texarkana 2005, pet. dism'd). That court observed that the State took several actions post-*capias* to attempt to locate the defendant. *Id.* at 806. It then observed that the record also contained "some evidence that the State failed to exercise due diligence." *Id.* at 806 n.5.[3] It then dismissed this comparison, however, because

> none of those are relevant to the affirmative defense of failure to attempt to contact [the defendant] in person at his last known address. The only evidence on that narrow point establishes that no such attempt was made. Therefore, that affirmative defense was proven, negating revocation on the ground of [the defendant's] failure to report.

Id. at 806.

In the instant case, Martell was permitted to reside in Mexico while on probation. (CR: 22). In December of 1999, Martell failed to report and so the

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[2] This is in contrast to the facts the *Bawcom* court analyzed in its own case. In *Bawcom*, the probation department, in addition to mailing letters and placing phone calls, also visited the probationer's residence as documented in the probation file. *See Bawcom*, 78 S.W.3d at 361.

[3] Prominent facts that the *Wheat* court considered were that the State "did not request [the county] to investigate or to contact any of [the defendant's] relatives. [The defendant's] community supervision officer admitted that no request was ever made to the [local] sheriff's office to execute the capias. Further, the community supervision officer testified that the community supervision office had not contacted or attempted to contact any of [the defendant's] relatives listed on his personal data sheet." *Wheat*, 165 S.W.3d at 806 n.5.

Department sent letters in January 2000 and in February 2000 notifying of him of his violations. (RR3: 9). That same month, on February 15, 2000, the Department placed an international call to the number Martell provided and made contact with a "Maribel" who identified herself as a friend of the Martell family. (RR3: 13). However, no other details of the call were recorded in the Department files. (RR3: 13). Neither the Department nor any law enforcement agent made any further attempts to contact Martell as documented by the Department file. (RR3: 20). More importantly, no field visit was ever conducted by either a probation department officer or law enforcement.

The trial court did not distinguish between pre-*capias* and post-*capias* efforts by the State in the instant case.[4] But the pre-*capias* efforts attempted in the instant case are similar to the efforts made in *Harris* that the *Bawcom* (analyzing the facts in *Harris*) court found insufficient: phone calls and letters. The court in *Bawcom* found the State's efforts sufficient because a probation officer made a field visit to the defendant's last place of residence. In both *Wheat* and *Harris*, the appellate courts stressed the lack of in person field visit which is mandated by article 42A.756.

[4] Leaving that aside, even if Martell had been living in El Paso and not residing as permitted in Mexico as he was, there still would not and could not have been any due diligence on the part of the State because, as the records reflects and the probation officer testified, it is against the El Paso County Probation Department's policy to attempt any contact with a probationer once a capias issues. (RR3:21).

The trial court's sole consideration seemed to be that Martell should not be rewarded for living in a foreign country, despite being permitted to under the terms and conditions of his probation. The plain language of article 42A.756 of the Texas Code of Criminal procedure explicitly obligates the State to make an in person field visit. The State did not provide proof that it ever did, and in fact the evidence was that no such visit was ever conducted. That undisputed fact is not subject to a credibility assessment by the trial court. The trial court's ruling is therefore legally insufficient as a matter of law.

The trial court's ruling is also factually insufficient because it goes against the great weight and preponderance of the evidence. The trial court believed it would be against "the interests of justice" to allow Martell to accrue the benefit of the State's lack of diligence.[5] (RR4: 5). However, it was the trial court that allowed Martell to reside in Mexico during the pendency of his probation. There is no indication in the record that the State ever objected to the condition. Moreover, neither the State nor the trial court conditioned Martell's foreign residence on his waiving his right to claim the affirmative defense. As such, Martell is entitled to assert the affirmative defense.

[5] If the trial court's ruling is construed as such, then the trial court implicitly found that Martell established he was entitled to the due diligence affirmative defense by a preponderance of the evidence. Consequently, even if this appellate court finds that the trial court's ruling was factually sufficient, it is still legally sufficient as a matter of law.

Viewing this evidence in the light most favorable to the trial court's ruling, the trial court abused its discretion by adjudicating Martell's community supervision. Consequently, this court should reverse the trial court's judgment, and remand the case with instructions to dismiss the State's motion to adjudicate appellant's probation.

CONCLUSION

The evidence and the record support the conclusion that the trial court erred in adjudicating Defendant Martell. First, the trial court abused its discretion in believing it had discretion as to whether Martell could even assert the affirmative defense of due diligence. The trial court further abused its discretion when it determined that Martell was not entitled to assert due diligence because, instead of residing in El Paso County, he resided with the trial court's permission in Ciudad Juarez, Mexico.

Second, even if the trial court did consider due diligence, it abused its discretion when it adjudicated Martell. The uncontroverted evidence adduced shows that no attempt was ever made to contact Martell in person at his last known residence address or last known place of employment by any supervision officer, peace officer, or any other officer before or after the 34th Impact Judicial District Court issued a *capias* on March 4 of 2002. The trial court's ruling is manifestly

unjust because Martell was residing in Mexico with the permission and full knowledge of the trial court and the probation department.

PRAYER FOR RELIEF

Mr. Martel prays that this Court reverse the trial court's ruling of the State's Motion to Adjudicate and that it remand the matter to the trial court with instructions to dismiss the Motion to Adjudicate.

EL PASO COUNTY PUBLIC DEFENDER

BY:***/s/ Octavio A Dominguez***

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the fore-going Brief for the Appellant was sent by e-mail using the E-serve system to the District Attorney's Office, 500 E. San Antonio Room 201, El Paso, Texas 79901 and mailed to the Appellant Mario Martell on this the 4th day of June, 2019.

BY***:/s/ Octavio A Dominguez***
OCTAVIO A DOMINGUEZ

CERTIFICATE OF COMPLIANCE

Undersigned counsel herein states that the computer generated word count is 4,416 and as such this document is in compliance with the Texas Rules of Appellate Procedure.

BY***:/s/ Octavio A Dominguez***
OCTAVIO A DOMINGUEZ